84-1388

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NO.

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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ROSA DIBELLO DARVILLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent

******

# PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

RICHARD A. DAMIANI

RICHARD A. DAMIANI &
ASSOCIATES CO., L.P.A.
One Public Square Bldg.
Eleventh Floor
Cleveland, Ohio 44113
(216) 241-7100

Counsel for Petitioner

48 pp

## QUESTIONS PRESENTED

Convicted of conspiring to distribute and possess cocaine and aiding and abetting in the knowing and intentional distribution of cocaine in violation of 21 U.S.C. Section 841(a)(1) and 21 U.S.C. Section 846, petitioner submits that the following questions are raised:

(1) Whether Appellant was denied her Sixth Amendment right to a fair trial because the Trial Court permitted the Jury to consider inadmissible hearsay evidence and inadmissible evidence of prior criminal acts.

(2) Whether the Trial Court committed reversible error by failing to state in the record its ruling and findings as to its preliminary determination that a conspiracy existed.

II

(3) Whether Appellant was denied her Sixth Amendment right to the effective assistance of counsel.

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ROSA DIBELLO DARVILLE,
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vs.

UNITED STATES OF AMERICA,
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# PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

Petitioner, Rosa DiBello Darville, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINION BELOW

The opinion of the Court of Appeals (Appendix, infra, pp. A1-A5) is an unreported opinion of the Sixth Circuit.

## JURISDICTION

The judgment of the Court of Appeals (Appendix, infra, pp. A1-A5), was entered on December 28, 1984. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Federal Rules of Evidence as promulgated by this Honorable Court provide:

Rule 404(B)

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to

show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of notice, opportunity, intent preparation, plan, knowledge, identity or the absence of mistake or accident. Rule 801(d)(2)(E)

The following definitions apply under this article:

* * *

(d) Statements which are not hearsay.—A statement is not hearsay if—

* * *

(2) Admission by party-opponent.—The statement is offered against a party and is (A) his own statement, in either

his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The pertinent portion of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

## STATEMENT OF THE CASE

On February 4, 1983, Petitioner, Rosa Darville, was indicted under Title 21, U.S.C. Section 841(a)(1) and 846 for distributing, conspiring to distribute, and conspiring to possess with intent to distribute a Schedule II narcotic drug, cocaine.

On February 18, 1983, Petitioner filed several motions including a motion for a James hearing asking the court to have a preliminary hearing regarding the existence of a conspiracy.

On April 27, 1983, a pre-trial was had at which the court ordered the government to provide the Petitioner with any statements made to undercover agents, and to provide Petitioner with notice of any agreement between the government and its witnesses.

On June 27, 1983, another pre-trial was had and a trial date was set for August 8, 1983.

Before trial on August 8, 1983, the court denied Petitioner's James hearing request and a jury was duly empanelled and sworn.

Trial lasted three days and on August 12, 1983 the jury returned a verdict of guilty on both counts of the indictment.

Motions for acquittal, arrest of judgmnet, and for a new trial, were timely filed on August 24, 1983. On August 24, 1983, those motions were denied.

On September 26, 1983, trial counsel entered a request to withdraw as counsel and that request was granted by

the court on September 29, 1983. Also, on September 2, 1983, the court sentenced Petitioner to 30 years on each count to run concurrently plus 6 years of special parole on Count 2 of the indictment and a fine of $50,000 on Count 2.

An appeal was timely filed with the Sixth Circuit Court of Appeals. On December 28, 1984 that court entered its opinion affirming the judgment of the trial court in its entirety.

This petition was thereafter timely filed.

## STATEMENT OF FACTS

The Petitioner, Rosa Darville, is a 50 year old white female. On September 17, 1982, Ms. Darville, by arrangement with an F.B.I. informant, met with two under-cover federal narcotics agents. These agents testified at trial that, at that meeting, Ms. Darville was attempting to

sell five kilograms of cocaine. They also testified that Ms. Darville gave them a sample packet of cocaine. Despite Ms. Darville's apparent representation that she had five kilograms of cocaine immediately available, the federal agents made no attempt to purchase that cocaine or to arrest Ms. Darville.

After that September meeting, the agents had no contact with Ms. Darville until January 13, 1983, three months later. At that time, one of the agents was in Florida and called Ms. Darville. The cocaine discussed at the September meeting was not mentioned but the agent did inquire about some cocaine coming in soon.

The agents testified that there were three more conversations with Ms. Darville about cocaine. One occurred on January 25, 1983 and the other two occurred on January 26, 1983. The January 25th conversation, according to the agent's testimony, concerned Ms. Darville's inability to bring cocaine to Cleveland from Florida. The agent stated that the first call from Ms. Darville on the 26th was to inform the agent that she was not able to bring cocaine to Cleveland. The agent also stated that in the second call, Ms. Darville told him that cocaine would be delivered to Cleveland later that day by her husband.

In fact, no cocaine was delivered on the 26th of January. The agent did testify, however, that an informant had told him that Ms. Darville had called to change the delivery date of the cocaine to the 27th of January.

Subsequently, on January 27, 1983, Aranha Darville was arrested at the Cleveland airport for possessing two kilograms of cocaine. The agents testified that Aranha Darville stated he was sent by Rosa but that statement was not recorded as the remainder of the conversation with Mr. Darville was.

When Aranha Darville was arrested, Rosa Darville was in Florida. She was later arrested and indicted for possessing and conspiring to distribute the cocaine

obtained from Aranha Darville upon his arrest. She was never indicted for possessing or conspiring to distribute any cocaine that was the subject of the September 17, 1982 transaction.

Ms. Darville was subsequently convicted of the charges stemming from Aranha Darville's arrest. That conviction is the subject of this petition.

## REASONS FOR GRANTING THE WRIT

### I.

The Court of Appeals determined, in a few passing sentences, that Petitioner was not prejudiced by inadmissible hearsay evidence or by a government witness' characterization to the jury, of Petitioner as a "dope dealer." This decision is in conflict with other circuit court opinions and must be reversed.

The Petitioner, Rosa Darville, was indicted under Title 21, U.S.C. Section 841 for knowingly and intentionally distributing a Schedule II narcotics substance. She was also indicted under Title 21, U.S.C. Section 846, for conspiring to distribute that same narcotic drug. The indictment charging these crimes specified that the conspiracy to distribute cocaine began on September 17, 1982 when Ms. Darville provided federal agents with a sample of cocaine. The indictment also alleged the September 17, 1982 transaction as an overt act of the conspiracy.

Equally important as what Ms. Darville was charged with is what she was not charged with. That is, Ms. Darville was

not indicted for possession of cocaine on September 17, 1982. Unfortunately, that was what she was tried for.

Rule 404(b) of the Federal Rules of Evidence provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The facts presented at trial show that Ms. Darville was convicted of both conspiracy to distribute and possession with intent to distribute cocaine based on four phone conversations with federal

agents. The indictment charged that the conspiracy began September 17, 1982 and ended January 27, 1983 and that the entire conspiracy was based on the January 27, 1983 arrest of Aranha Darville. There was no indictment for possession or a conspiracy stemming from the September 17, 1982 sample transaction. Accordingly, that act was separate from and prior to the conspiracy charged in the indictment.

The jury heard the testimony of four witnesses; two F.B.I. agents, a fingerprint expert, and a forensic chemist. All of the testimony of the fingerprint expert concerned the sample packet of cocaine from September 17, 1982. Nearly all of the testimony of the forensic chemist involved his analysis of the cocaine in that packet. The majority of the special

agents' testimony also revolved around the September 17, 1982 meeting. The record clearly demonstrates that the jury thought Ms. Darville was on trial for possessing cocaine on September 17, 1982. At trial, the packet of cocaine from the September 17, 1982 meeting was marked as Exhibit No. 1. A short time into the jury deliberations, the foreman sent the following question to the court:

> "In count one under 'elements there are three parts listed. The first part states that Rosa Darville possessed a narcotic drug controlled substance in count one of the indictment. Is that drug controlled substance Exhibit No. 1, or is it the alleged five kilos, or is it cocaine generally?"

The question clearly demonstrates that the cumulation of evidence presented about the September 17, 1982 transaction caused them to think that act was the subject of the indictment. But the indictment charges, in Count II, the possession of two kilograms of cocaine, and Count I charges a conspiracy to distribute that cocaine. The indictment could not refer to the sample packet marked Exhibit No. 1 because it was far too small a quantity to justify an intent to distribute. Nevertheless, the trial court failed to cure the error and answered the jury in an equally confusing manner.

Count one alleges that Rosa Darville conspired to distribute cocaine,

and that she conspired to possess sufficient cocaine to support an inference of possession with intent to distribute.

An appropriate curative instruction would have been simply that, "Count one refers to the two kilograms of cocaine found in the possession of Aranha Darville upon his arrest." Such a response would have been far more accurate and would have eliminated the jury's confusion.

The mandate of Rule 404(B), promulgated by this Honorable Court, was violated. The evidence of another crime, the September 17, 1982 transaction, was used to prove that the character of Ms. Darville was that of a cocaine dealer.

The evidence of the September 17, 1983 transaction was not the only evidence admitted to prove the character of Ms. Darville in order to show she acted in conformity therewith. As defense counsel cross-examined one of the federal agents a response was elicited that was so prejudicial to Ms. Darville that it demands a remand for a new trial.

BY MR. GELETY:

Q. What was the input?

A. Advised that a dope dealer was coming in on the 17th, would the F.B.I. be interested, and I said yes. "Where do you want to meet her at," and I said "We will meet her at your place.

We are not going to do any buying there; just an introduction."

Q. As to what happened before that piece of information, you didn't have any contact?

A. No sir.

After Agent Domine referred to Ms. Darville as a dope dealer, counsel objected and moved for a mistrial. That motion should have been granted by the court below.

In United States v. James, 208 F.2d 124 (2nd Cir. 1953) a narcotics agent testified against the defendant he had arrested. In explaining the circumstances of the arrest to the jury he mentioned that the defendant had been arrested on an earlier date. The court held this statement so prejudiced the defendant that reversal was required.

> The appellant did not testify and no evidence to show his unsavory character was admissible, not because of its irrelevance, but because of a dominant policy which recognizes that what tends to show a likelihood that the accused had flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial on the instant charge. Id.

The characterization, made by an F.B.I. agent to the jury, of Ms. Darville as a "dope dealer" was not only hearsay, but was a grossly prejudicial characterization. That type of testimony is certain to lead the jury to believe that Ms. Darville was presently

being prosecuted for the latest in a string of criminal acts. The same situation presented itself in United States v. Escobar, 674 F.2d 469 (5th Cir. 1982), and that court was forced to remand the case for a new trial.

In Escobar the arresting police officer was permitted to testify, over objection that the defendant,

> ... did have a prior record and was entered in the computer as being a suspected narcotics smuggler ...

United States v. Escobar, supra, at 474.

Citing Rule 404(b) of the Federal Rules of Evidence the court in Escobar noted that "Extensive offense evidence is never admissible to show that a defendant had a bad character or propensity to commit the crime in issue, although it may be admissible for some other relevant purpose. United States v. Escobar, supra, at 474.

The factual similarity of Escobar and the instant case is readily apparent. In both cases a law enforcement official testified to a grossly prejudicial characterization of the defendant. In Escobar the phrase was "narcotics smuggler" and in the instant case, "dope dealer". Accordingly, the instant case demands the same result as Escobar.

> Under the circumstances of this case, we conclude that the admission of the officer's testimony was plain error necessitating reversal of Manso's conviction and remand for a new trial.

United States v. Escobar, supra at 475.

Since the decision of the Fifth Circuit in Escobar and the decision of the Sixth Circuit in the instant case cannot

be reconciled, this Honorable Court should grant this petition for certiorari.

II.

The decision of the Court of Appeals admits, as Petitioner argued, that no hearing was had by the trial court upon the issue of whether conspiracy existed. But, the Court of Appeals found that the determination was made implicitly. That ruling, however, ignores the requirement that the basis for the finding of a conspiracy be made on the record.

Under Rule 801(d)(2)(E), statements of a co-conspirator are not hearsay if made in the course of, and in furtherance of a conspiracy. Under the rule of United States v. Enright, 578 F.2d 980 (6th Cir. 1978), and United States v. Vinson, 606 F.2d 149 (6th Cir. 1979), the court

must determine if a conspiracy existed before the hearsay testimony is to be admitted. The court below used the third method suggested by Vinson to make the preliminary ruling on the conspiracy question. The court below failed, however, to state at any point, whether it found a conspiracy and it failed to provide any specific findings in support of a holding that a conspiracy existed.

From the outset the court seemed to assume that a conspiracy existed.

The confusion here again centers on September 17, 1982, when Ms. Darville gave the agents a sample of cocaine. If that cocaine was the cocaine that Ms. Darville conspired to distribute, then a conspiracy exists. But that conspiracy is completely separate from the one charged in the indictment. So, the court

may have found, by a preponderance of the evidence, that a conpsiracy existed and on that basis allowed into evidence, hearsay testimony made in the course and furtherance of a different conspiracy never found to have existed.

In United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980), the trial court admitted hearsay made in the course and furtherance of a conspiracy. The indictment, however, charged a conspiracy different from the one the court found to exist. The court unequivocally held that such an error was clearly prejudicial and required reversal.

The lack of findings on the record was found to be the cause for reversal in United States v. Piccolo, 696 F.2d 1162 (6th Cir. 1982)(Piccolo I). There the

court held that the vague nature of the indictment allowed the government to admit hearsay evidence based on a finding of a conspiracy not alleged in the indictment.

Piccolo I was reversed in United States v. Piccolo, 723 F.2d 1234 (6th Cir. 1984) (Piccolo II), by the appellate court sitting en banc. That reversal, however, did not change the requirement set out in Piccolo I that specific findings regarding the preliminary question of a conspiracy's existence should be set out in the record.

Also, in United States v. Bell, 573 F.2d 1040 (8th Cir. 1978), the court listed instructions on the procedure for making a preliminary determination about a conspiracy. One of those requirements is that the court make an explicit determination on the record of whether the

government has proved a conspiracy by a preponderance of the evidence.

The court in United States v. Continental Group, Inc., 603 F.2d 444 (3rd Cir. 1979), cert. denied, 444 U.S. 1032 (1980), also required the trial court to make an explicit statement on the record that it has found a conspiracy to exist. See also, United States v. Williams, 604 F.2d 1102 (8th Cir. 1979).

The same standard must apply in the instant case. The jury clearly thought that the conspiracy to distribute involved the sample packet of cocaine. This confusion was made evident by the question the jury sent to the court. There is no finding, on the record, to demonstrate that the court didn't fall subject to the same confusion.

The court may have found that, based on the September 17, 1982 transaction alone,

that a conspiracy existed to sell five kilograms of cocaine. The court then, however, allowed in hearsay testimony to support the charge in the indictment that Ms. Darville conspired to distribute two kilograms of cocaine with her husband, Aranha Darville. The ruling in Fielding clearly prohibits this type of cross-admissibility and Vinson requires specific findings on the record to prevent the error made in Fielding.

The ruling by the Court of Appeals is incomplete and in error. This petition should therefore be granted by this Honorable Court.

III

The Sixth Amendment provides that, " ... the accused shall enjoy the right ... to have Assistance of Counsel

for his defense." This right has consistently been interpreted as being equivalent to the right of "effective" assistance of counsel. McCann v. Richardson, 397 U.S. 759 (1970). In the instant case, Ms. Darville's attorney made comments in his closing argument that flagrantly prejudiced Ms. Darville's right to a fair trial.

In the recent case of United States v. Cronic, _____U.S._____, 104 S.Ct. 2039 (1984), this Honorable Court made clear that a claim of ineffective assistance of counsel requires a showing of actual, not theoretical ineffectiveness. In the instant case, the record contains several instances where actual ineffectiveness of counsel was demonstrated.

The most obvious and egregious error committed by counsel, however, was in the

closing argument. First, counsel highlighted Ms. Darville's failure to testify.

> BY MR. GELETY: * * *Well, there was certainly a lack of evidence by the defense because you didn't say anything.

Then counsel went on to characterize Ms. Darville's acts as part of a national drug problem, a characterization that, if made by the prosecutor, would be impermissible. Defense counsel's use of this characterization is therefore all the more egregious.

> BY MR. GELETY: * * *What better way for you people to help this community, to help your neighborhood, to help this city in general than to find her guilty? This is going to make up for all those

newspaper articles about somebody slipping through the system, about someone beating the case on a loop-hole technicality. This is your chance to finally have an active role in helping the crime problem because now you are sitting there and you could say, "This is going to make up for it; we are going to send her. I mean why shouldn't we? We are talking about two kilos of co-caine, street value of over a million dollars. We are talking about special agents from the F.B.I. What else do we need? This is the time for us to take a stand, this is the time for us to fight back against crime. We are not going to be the silent majority any longer. We are going to tell Rosa Darville, you are the first step."

> Well, I can't stop you from doing that because once I sit down here, ladies and gentlemen, I am finished, I am finished. No more questions, no more objections, no more pointing out to you anything about this case. I have to figure, I have to hope and I have to pray that you got the message, that you can see which way this thing is heading, where it should be heading and why it can't get there.

Other than a plea of guilty, it is hard to imagine a more damning soliloquoy. This court in Cronic, supra, noted that the adversary process as a truth seeking tool is the heart of the right to counsel. When one of the adversaries strongly endorses the opposing view, the quest for truth is lost.

Considering the amount of prejudice injected at trial by the admission of hearsay, evidence of a prior criminal act, and the characterization of Ms. Darville as a "dope dealer", defense counsel's remarks in closing argument were equivalent to an admission of guilt.

The Court of Appeals summarily decided that these actions by trial counsel were, "subject to criticism", but did not violate the rule of law set out in Cronic and in Strickland v. Washington, _____U.S. _____, 104 S.Ct. 2052 (1984).

This court in Strickland, supra, held that before a court could conclude that the Sixth Amendment's right to counsel had been violated two elements must be present. First, the trial counsel's representation must fall below an objective standard of reasonableness. In this vein, the court

stated that judicial scrutiny of counsel's performance must be highly differential, and a fair assessment of the performance requires that every effort be made to eliminate the distorting effects of hindsight. Moreover, in this regard a reviewing court must indulge a strong presumption that the conduct fell within the wide range of reasonable professional assistance.

Secondly, in order to show a violation of the Sixth Amendment right to counsel a defendant must show prejudice. This prejudice is defined as a showing that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceedings would have been different. In this vein, a court must consider the totality of the evidence. A "reasonable probability" is defined as a

probability sufficient to undermine confidence in the outcome of the trial.

The court went on to indicate that if one of these elements was not present there was no need to look into the remaining element.

In the instant case, both of these criteria were present. But for the irrational closing argument, and assuming a competent argument was made, it is highly probable a different outcome would have resulted at trial.

The Court of Appeals did not discuss these criteria and the error demands the granting of this petition.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition

for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD A. DAMIANI

RICHARD A. DAMIANI &
ASSOCIATES CO., L.P.A.
One Public Square Bldg.
Eleventh Floor
Cleveland, Ohio 44113
(216) 241-7100

Counsel for Petitioner

# APPENDIX

## OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Issued as Mandate, December 28, 1984)

No. 83-3712

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

********

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROSA DIBELLO DARVILLE,
Defendant-Appellant.

********

## O R D E R

Before LIVELY, Chief Judge; MERRITT, Circuit Judge; and PECK, Senior Circuit Judge.

PER CURIAM. This is an appeal from a jury conviction for conspiring to distribute and possess cocaine and aiding and abetting in the knowing and intentional distribution

of cocaine in violation of 21 U.S.C. Section 841(a)(1) and 21 U.S.C. Section 846. The defendant raises three issues on appeal, all of which have been examined carefully by the court. We conclude that the district court did not commit reversible error and, accordingly, we affirm.

The defendant argues that she was prejudiced by the admission of hearsay testimony which prejudiced her in the eyes of the jurors. The testimony of which the defendant complains cannot be the basis for reversal. One of the statements by a government agent was clearly elicited by the defendant's attorney and the question which produced the statement was objected to by the prosecuting attorney. The other statements, though hearsay, come within ex-

ception to the hearsay rule which permits the admission of hearsay statements by co-conspirators.

The second allegation of error is that the district court failed to make an explicit finding that a conspiracy existed for the purpose of admitting hearsay statements of a co-conspirator. See United States v. Enright, 579 F.2d 980 (6th Cir. 1978), and United States v. Vinson, 606 F.2d 149 (6th Cir. 1979). A careful examination of the record convinces this court that the district court was prepared to make such an explicit finding when assured by counsel for the defendant that this ruling had previously been made. Further, in submitting the case to the jury with the hearsay testimony of the co-conspirator in the record and without any qualifying instructions,

the district court implicitly made a finding that a conspiracy had been established by a preponderance of the evidence. We are not presented with a situation where the district court was unaware of the requirements of Enright and Vinson and permitted the jury to consider hearsay testimony of a co-conspirator without recognizing the necessity to find the existence of a conspiracy. See United States. v. Holloway, 731 F.2d 378 (6th Cir. 1984).

The third allegation of error relates to the performance of defendant's trial attorney. While some of the strategies employed by the trial attorney are subject to criticism, this court is convinced that the representation defendant received was not ineffective under the standards recently set forth by the

Supreme Court of the United States in United States v. Cronic, _____U.S._____, 104 S.Ct. 2052 (1984), and Strickland v. Washington, _____U.S._____, 104 S.Ct. 2052 (1984).

The judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk